JUSTIN ONG SENG BENG & ORS *a*

v.

ONG LEE HOON (NO 3)

HIGH COURT MALAYA, KUALA LUMPUR *b*
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-801-1996]
28 JANUARY 2000

CIVIL PROCEDURE: *Interim Payment - Failure to specify provision relied on - Amount not certified - Whether admission of sum due tantamounts to certification - Rules of the High Court 1980, O. 22A rr. 3, 4* *c*

The defendant was appointed as the trustee to a trust fund created for the benefit of the plaintiffs. Pursuant to the court order dated 31 January 1997, the defendant produced a trustee account wherein the defendant admitted owing the trust fund S$1,138,425.56. Based on this admission, the plaintiffs filed an application under O. 22A Rules of the High Court 1980 for an order that the defendant made an interim payment to the plaintiffs. Counsel for the defendant argued that the plaintiffs at this stage were not entitled to any interim payment. It was also contended by the defendant's counsel that the plaintiffs failed to specify the provision on which the plaintiffs were relying, *ie*, O. 22A r. 3 or r. 4. The plaintiffs' counsel informed the court that he was relying on O. 22A r. 3(1)(a) and (c). The issues before the court were: (i) whether the instant application fell under r. 3; and (ii) whether the court could grant an order under r. 4 when no amount had been certified. *d* *e* *f*

Held:

[1] As O. 22A r. 4 deals with matters other than damages, the plaintiffs' claim made under a trust account must fall under r. 4. *g*

[2] Whilst the proper application ought to be under r. 4 and not r. 3, a mere wrongful submission of law by the plaintiffs' counsel should not deprive the plaintiffs of a valid claim when such was clearly seen to exist as in the instant case. Furthermore, the admission of the defendant could be equated to a certification as was required under r. 4(a) and it was sufficient for the court to grant an interim order under O. 22A r. 4. *h*

[Allowing the application.] *i*

Legislation referred to:
Rules of the High Court 1980, O. 22A r. 3(1)(a), (b) & (c), O. 22A r. 4(a)

For the plaintiffs - David Mathews (Suraya Hussain with him); M/s Abdul Aziz, Ong & Co
For the defendant - Azlan Sulaiman; M/s Ghazi & Lim

Reported by Izzaty Izzuddin

JUDGMENT

RK Nathan J:

The Application

This is an application by the plaintiffs for an order that:

(a) the defendant make an interim payment to the 1st plaintiff to hold as trustee for himself and the 2nd plaintiff the sum of Singapore Dollars One Million One Hundred and Thirty Eight Thousand and Four Hundred and Twenty Five and Cents Fifty Six Only, SD1,138,425.56 (the said sum) being the sum admitted by the defendant as owing as at 1 June 1998 to the trust fund established by Madam Chin Chooi Choo on 24 July 1980 through an instrument of settlement (the settlement) and to the 1st and 2nd plaintiffs as the beneficiaries of the settlement within fourteen (14) days from date of this order together with interest thereon to be calculated at the rate of 8% per annum from 1 June 1998 to date of full payment;

(b) the 1st plaintiff as trustee over the said sum be vested with all rights and powers of trustee under the settlement with full liberty to apply the said sum or any part thereof in accordance with the provision of the settlement for the benefit of the 1st and/or the 2nd plaintiff herein.

(c) the payment of the said sum shall be without prejudice to the rights of the 1st and 2nd plaintiffs herein to recover all assets, monies and properties rightfully due and owing to the trust fund under the settlement and the 1st and 2nd plaintiffs herein as the beneficiaries thereof; and

(d) costs.

Facts

The grandmother of the 1st and 2nd plaintiffs, Chin Chooi Choo, by a deed of settlement dated 24 July 1980, created a trust fund for the benefit of the 1st and 2nd plaintiffs. The trust fund was established with a sum of GBP135,000 which was from time to time, together with the accumulated

interest, converted into various other currencies and deposited in various banks in Asian Currency Unit Deposits (the trust fund). The defendant was appointed the trustee of the said trust fund.

On 31 January 1997 this court granted the plaintiffs the following orders:

(1) that the defendant, as a trustee under the settlement deed dated 24 July 1980 and created by Chin Chooi Choo (F) (NRIC No. 0114680), do produce the accounts on the sum of GBP135,000 together with interest and/or profits accruing thereto.

(2) that the defendant whether by herself, her servants or agents or anyone howsoever, be restrained from disposing of and/or using the said sum of GBP135,000 together with the interest and/or profits therein unlawfully, or by not complying with the rules of the Trustee Act 1949 and other relevant laws or rules and/or by not complying with the terms and conditions of the said settlement document.

On 26 June 1998 the plaintiffs obtained an order for interim payment (the interim order) out of the trust fund, for educational expenses, the sums amounting to GBP10,000 and GBP9,051.79 for the 1st and 2nd plaintiffs respectively.

On 4 September 1998 this court dismissed the defendant's application to adduce fresh accounts. This court also directed that the defendant do furnish the accounts and that the same was to be verified by an affidavit and lodged in accordance with the practice adopted in *Atkin's Court Forms.*

Findings Of The Court

After many requests for adjournments the defendant finally produced what she called a trustee account prepared by Rabin & Co, a firm of accountants. I find as a fact that in that very account itself the defendant has admitted owing the trust fund the sum of S$1,138,425.56 as at 1 June 1998. I had also in my earlier written judgment dated 4 September 1998 found that the defendant had pledged the said trust fund against overdraft facilities which were later utilised in full to settle the said overdraft facilities.

On 15 April 1999 this court granted the plaintiffs an order for a Mareva injunction and for interrogatories. Whilst the plaintiffs have not accepted the trustee account produced by the defendant as correct and had challenged and disputed the same, I accept the plaintiffs' without prejudice submission that the admissions of the defendant that she owed the trust fund the sum of S$1,138,425.56 ought to be held against the defendant. In challenging the truth of the trustee account the plaintiffs sought leave to

cross-examine the defendant and although the cross-examination was fixed for 30 March 1999 I had adjourned the same pending the defendant's disclosure of all monies and assets pursuant to my order dated 15 April 1999. Clearly therefore this application of the plaintiffs is based on the defendant's admission of owing the trust fund the sum of S$1,138,425.56.

By a supplementary affidavit the plaintiffs have itemised their specific requirements which are reproduced herewith:

(a) The 1st plaintiff

	Particulars	**Amount**		
(i)	School Fees (Marlborough College) (1990-1992) (1992-1995)	GBP 43,938.84	–	loan repayment
(ii)	University Fees (Durham University)			
	(1996/1997)	GBP 6,398.00	–	loan repayment
	(1997/1998)	GBP 6,622.00	–	loan repayment
	(1998/1999)	GBP 6,600.00	–	loan repayment
(iii)	Legal Practitioner's Course Fees	GBP 6,400.00	–	payable
(iv)	Membership fees for Law Society	GBP 205.00	–	payable
(v)	Food, lodging transportation (GBP 1,500.00 per month x 12 months)	GBP 18,000.00	–	payable
(vi)	Books and stationeries	GBP 500.00	–	payable
	Less sum paid by defendant	(GBP 10,000.00)		
	TOTAL SUM REQUIRED	GBP 78,663.84		

(b) The 2nd plaintiff

	Particulars	Amount		
(i)	School fees (1994-1998) Total: GBP 101,888.04 Less GBP 9,051.79 already paid by the defendant	GBP 92,836.25	–	loan repayment
(ii)	University fees (London School of Economics (LSE))(1998-1999) Total: GBP 8,764.00 partially paid in 2 instalments.			
	Balance to be paid: GBP 2,938.00	GBP 2,938.00	–	loan repayment payable
	(1999-2000)	GBP 8,764.00	–	payable
	(2000-2001)	GBP 8,764.00	–	payable
(iii)	Hostel fees (1998-1999)	GBP 2,257.96	–	loan repayment
(iv)	Food, lodging and transportation (GBP 1,000.00 x 24 months) (1999-2001)	GB P24,000.00	–	payable
	TOTAL SUM REQUIRED	GBP 145,386.21		

Whilst initially arguing for an order for the full sum admitted, the plaintiffs prayed for an alternative order for payment of the total sum of GBP224,050.05 being the sum total of both the plaintiffs' requirements. It was conceded by the plaintiffs that this total sum now sought has in fact taken into consideration the amounts already paid by the defendant pursuant to a previous order of this court.

Encik Azlan for the defendant on the other hand argued that the plaintiffs were not at this stage entitled to any interim payment. Whilst the plaintiffs have pleaded that the said application was based on O. 22A of the Rules

of the High Court 1980 (the RHC), the plaintiffs did not specify if the said application was made pursuant to r. 3 or r. 4 because r. 3 deals with the order for interim payment in respect of damages whereas r. 4 deals with an order for interim payment in respect of sums other than damages. It was the contention of Encik Azlan that this application ought to have been made pursuant to r. 4 because this matter related to other claims and not to damages. It is therefore necessary to reproduce both the relevant rules:

Order 22A r. 3

3 Order for interim payment in respect of damages

(1) If, on the hearing of an application under rule 2 in an action for damages, the Court is satisfied:

(a) that the defendant against whom the order is sought (in this paragraph referred to as 'the respondent') has admitted liability for the plaintiffs' damages; or

(b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or

(c) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them,

the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.

(2) No order shall be made under paragraph (1) in an action for personal injuries if it appears to the Court that the defendant is not a person falling within one of the following categories, namely:

(a) a person who is insured in respect of the plaintiff's claim;

(b) a public authority; or

(c) a person whose means and resources are such as to enable him to make the interim payment.

Order 22A r. 4

4 Order for interim payment in respect of sums other than damages

If, on the hearing of an application under rule 10, the Court is satisfied:

(a) that the plaintiff has obtained an order for an account to be taken as between himself and the defendant and for any amount certified due on taking the account to be paid; or

(b) that the plaintiff's action includes a claim for possession of land and, if the action proceeded to trial, the defendant would be held liable to pay to the plaintiff a sum of money in respect of the defendant's use and occupation of the land during the pendency of the action, even if a final judgment or order were given or made in favour of the defendant; or

(c) that, if the action proceeded to trial, the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs,

the Court may, if it thinks fit, and without prejudice to any contention of the parties as to the nature or character of the sum to be paid by the defendant, order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely.

Mr. Mathews informed the court that he was in fact relying on r. 3(1)(a) and (c) based on the defendant's admission. He conceded that he cannot proceed under r. 4 because to date no amount has actually been certified. In the course of submission the defendant argued that she was not a trustee. I then referred Encik Azlan to various references to the defendant as trustee, in the affidavits and exhibits. It is not now in dispute that the defendant is no longer the trustee of the said trust fund and as such there is no lawful basis for the defendant to retain at least, all the monies due under the trust fund.

The question that arises is does the present case fall under r. 3 as proposed by the plaintiffs. It is my considered judgment that this application cannot be considered under r. 3 which deals with damages and certainly that is not the case here. Clearly this application must fall under r. 4 which deals with matters other than damages and certainly a claim made under a trust account must fall under r. 4. If that be the case, then the defendant prays that no order be made because no amount has been certified pursuant to r. 4(a).

But then ought this court allow the defendant to raise this defence? Can the defendant raise her own delay and refusal to produce the proper set of accounts as a defence to the plaintiffs' legitimate claim based on the defendant's own admission? The inequitable conduct of the defendant must certainly negate any such defence. A party in default cannot shield herself

from a legitimate claim by raising her own inequity as a defence. Whilst the proper application ought to be under r. 4 and not r. 3 as contended by the plaintiffs' counsel, a mere wrongful submission of the law by counsel should not deprive the plaintiffs of a valid claim when such is clearly seen to exist as in this case. Further, the admission of the defendant can be equated to a certification as is required under r. 4(a). Whilst an order for an account has yet to be taken because the cross-examination of the defendant by the plaintiffs challenging the truth of the defendant's trustee account has yet to be completed, the very fact that the defendant has admitted to the sum is sufficient for me to grant an interim order under O. 22A r. 4.

Since the sums due have specifically been claimed in encl. 158, I shall make the following awards having considered the sums asked for:

The 1st plaintiff

(i) GBP 43,938.84 (already settled by the defendant)

(ii) GBP 19,620 (already settled by the defendant)

(iii) GBP 6,400 (allowed)

(iv) GBP 205 (allowed)

(v) In respect of food, lodging and transportation claimed at GBP 1,500 per month for 12 months, I allowed a sum of GBP 750 for 12 months amounting to GBP 9,000.

(vi) In respect of the claim of GBP 500 for books and stationeries, I awarded a sum of GBP 500.

Out of all these sums, a sum of GBP 10,000 already paid by the defendant should be deducted.

Hearing of the 2nd plaintiff's claim was adjourned to another date.